

District Court Judge Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Kirti Tiwari, Seung Yoon Yang, Amandeep Singh, Duncan Makau, Valdeta Mehanja, Rui Zhang, Raj Chettri, Thong Nguyen, Xi Cui, Rajat Kaushik, Pingyang Liu, Blerta Mehanja, Mengmeng Cai, Sandeep Singh, Fleury Ngantchop Keigni Di Satchou, Kaushal Wadhwani, Angelita Acebes, Kusuma Nio, and Qi Xiong,

Plaintiff,

v.

James Mattis, Secretary, U.S. Department of Defense, in his official capacity,

Defendant.

No. 2:17-cv-00242-TSZ

**PLAINTIFFS' MOTION IN LIMINE
TO PRECLUDE UNDISCLOSED
EXPERT OPINIONS**

**Note on Motion Calendar:
November 2, 2018**

DoD has not designated any expert witness, nor made any expert disclosure, in this case. DoD has listed several DoD employees in its recent Amended Rule 26(a)(1) Initial Disclosure and identified the subjects regarding which DoD intends to have these witnesses address at trial. (Ex. 1) For example, DoD states that witness Stephanie Miller has:

information about, *inter alia*, the security concerns presented by the MAVNI program and the justifications for the screening

requirements challenged by Plaintiffs in this case, the scope of the RAND report commissioned by the Army in 2015; and DoD's personnel security policy regarding permitting soldiers who enlisted in the Army through the MAVNI program to be considered for officer commissioning programs during their first term of enlistment.

(Ex. 1 p. 2) However, the declaration previously filed in this case by Ms. Miller does not address the facts and opinions regarding any of the foregoing subjects with the exception of the RAND Report. (Ex. 2, see also Dkt. 141-3)

DoD also recently identified for the first time Joseph Simon as a proposed witness on its October 5, 2018 Amended Rule 26(a)(1) Initial Disclosure. The only information DoD provided regarding Mr. Simon's proposed testimony is that he:

has information about, *inter alia*, the security concerns presented by the MAVNI program and the justifications for the screening requirements challenged by Plaintiffs in this case.

(Ex. 1 p. 3) No disclosure had been provided regarding Mr. Simon's actual opinions nor any facts supporting those opinions.

DoD witnesses "who are qualified as an expert by knowledge, skill, experience, training, or education" (Fed. Rule of Evid. 702) should be precluded from providing any opinion testimony at trial where they have not previously and timely provided "a summary of the facts and opinions to which the witness is expected to testify." Fed. Rule Civ. Proc. R. 26 (a)(2)(C). Individuals, such as non-retained in-house employees, must timely provide a "summary of the facts and opinions to which they are expected to testify" before being allowed to offer an opinion on a subject for which they "qualif[y] as an expert by knowledge, skill, experience, training, or education." (*Id.*, Fed. Rule of Evid. 702) Having elected to only provide very limited disclosure regarding certain witnesses, and no disclosure

1 at all regarding other witnesses, DoD witnesses should be precluded from offering any
2 expert opinion not supported by a previous and timely-served disclosure of the proposed
3 opinion and the facts supporting that opinion.¹
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5 DATED this 18th day of October, 2018.

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1 The parties conferred by telephone in good faith regarding the subject of this motion and were unable to resolve this dispute. While the parties conceptually agree that DoD witnesses who have not made a disclosure under Rule 26(a)(2)(C) are limited to “factual” testimony, it appears from the listed subjects that the parties substantially disagree regarding what constitutes “factual” verses “opinion” testimony.

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October, 2018, I filed the foregoing and all documents in support thereof, with the Clerk of Court using the CM/ECF System which will send notification of such filing to the following:

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/s/ Neil T. O'Donnell
Neil T. O'Donnell